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In the Supreme Court of the United States

October Term, 1953.

Glo Co., an Illinois corporation, *Petitioner*,

vs.

T. F. Murchison, Murchison and Company, a Delaware corporation, Barnsdall Oil Company, a Delaware corporation, and Sunray Oil Corporation, a Delaware corporation, *Respondents*.

BRIEF OF RESPONDENTS, SUNRAY OIL CORPORATION AND BARNSDALL OIL COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

James C. Denton, Jr.,
Attorney for Respondents, Barnsdall Oil Company and Sunray Oil Corporation.

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1953.

No. 752

Glo Co., an Illinois corporation, *Petitioner*,

vs.

T. F. Murchison, Murchison and Company, a Delaware corporation, Barnsdall Oil Company, a Delaware corporation, and Sunray Oil Corporation, a Delaware corporation, *Respondents*.

BRIEF OF RESPONDENTS, SUNRAY OIL CORPORATION AND BARNSDALL OIL COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported at 208 F. (2d) 714 and its opinion in denial of rehearing appears at 210 F. (2d) 372 (also shown at Tr. 233-235 and 246-248).

In February of 1951 petitioner brought this action in the United States District Court for the Western District of Texas, San Antonio Division, against T. F. Murchison, an individual, Murchison and Company, a Delaware corporation, Sunray Oil Corporation, a Delaware corporation, and Barnsdall Oil Company, a former Delaware corporation, previously merged into Sunray Oil Corporation.

The respondents, Sunray Oil Corporation and Barnsdall Oil Company, in addition to their Answer and Motion for Summary Judgment, moved to dismiss the complaint on the grounds that petitioner was a foreign corporation doing business in Texas without a permit, as required by Articles 1529, 1536, and 2031(a), of the Revised Civil Statutes of Texas, 1925, and therefore was incapacitated to maintain the suit (Tr. 187, 119, 120).

Thereafter, the trial court set for hearing both the motions for summary judgment and those to dismiss (which had been filed by all respondents) and, on said hearing, sustained the motions to dismiss without action on the motions for summary judgment (Tr. 214). Petitioner thereafter filed its motion for the trial court to make written findings of fact and conclusions of law (Tr. 215-216) which said motion was overruled by the court (Tr. 219). Judgment dismissing plaintiff's action was then entered in accordance with the trial court's prior ruling (Tr. 220, 221).

Petitioner perfected its appeal from such judgment and ruling of the trial court to the United States Court of Appeals for the Fifth Circuit. Such appeal was based solely on the trial court's dispositon of the case on respondents' motions to dismiss (Tr. 221 and 224-225).

The United States Court of Appeals on January 6, 1954, after hearing argument of counsel in the matter, entered judgment modifying the judgment of the trial court so as to provide for a dismissal without prejudice and, as so modified, the judgment of the trial court was affirmed (Tr. 236, with opinion at Tr. 233).

On January 20, 1954, petitioner filed its petition for rehearing in the United States Court of Appeals for the Fifth Circuit (Tr. 237), which was denied by that court on

February 12, 1954 (Tr. 248), with opinion appearing at 210 F. (2d) 372 (Tr. 246). Thereafter, on February 27, 1954, petitioner filed its second petition for rehearing (Tr. 249) which was denied by the United States Court of Appeals for the Fifth Circuit without opinion (Tr. 265).

Petitioner is an Illinois corporation (Tr. 189), chartered to carry on what may be described as the business of purchase and sale, exploration and development of oil and gas property, and the sale of the production therefrom, all for pecuniary profit (Tr. 190-197 at 193-194).

Petitioner has not received a permit to do business in Texas, nor has it filed its Articles of Incorporation in the Office of the Secretary of State of the State of Texas pursuant to Articles 1529, 1536, or 2031(a), Revised Civil Statutes of Texas, 1925 (Tr. 97-98).

Petitioner's action is a civil action based on diversity of citizenship of the parties (Tr. 2, 9, 11, 13, 15-16, 19, 22). All counts of the complaint are based on the 1941 contract (Tr. 8, 10, 13, 14-15, 17-18, 21-22, 23-24), and that contract is attached as Exhibit 1 to the complaint (Tr. 24-47).

By the 1941 contract, petitioner assigned to the individual, T. F. Murchison, twenty-three oil and gas leases on lands in the R. P. Haldeman Subdivision of the Seeligson Ranch, Jim Wells County, Texas (Tr. 36-41). The contract itself showed that the primary terms of six of such leases expired in 1941 (Tr. 25, 26, 27, 32, 35), seven of them expired in 1942 (Tr. 26, 28, 28-29, 31, 32, 33, 34), three expired in 1943 (Tr. 24-25, 27-28, 34-35), and four of them expired in 1945 (Tr. 26-27, 29-30, 30, 31-32). The 1941 contract states that the two remaining leases, No. 20 and No. 25, were then held by gas production (Tr. 33, 33-34). Only certain zones under twenty acres of land covered by said

lease No. 20 were assigned by the 1941 contract (Tr. 40), and this interest is the same interest under the same lease that petitioner, as owner thereof, did assign to Sunray Oil Corporation and Murchison and Company on August 31, 1950 (Tr. 82-90). Lease No. 25 is subject to another action, brought by petitioner, Civil Action 1440 in the United States District Court for the Western District of Texas, San Antonio Division, and to which action none of the respondents herein is a party.

The 1941 contract sued on by petitioner reserved unto petitioner an overriding royalty in said leases of 1/16 of 7/8 (Tr. 41). It provided:

> "The assignor is at the present time negotiating and attempting to procure new oil and gas leases covering lands located in the Premont Field, and it agrees to use its best efforts to procure such new leases, and if successful in such efforts it agrees to assign same to the assignee, or his successors or assigns, subject to all the terms and provisions of this assignment," (Tr. 44)

and,

> "The assignor is also negotiating with the holders of the overriding royalties and the oil payments hereinabove described for a reduction in the amounts thereof, and it agrees to carry on such negotiations in good faith and use its best efforts to obtain such reduction, and if successful in doing so agrees that the same shall be for the benefit of the assignee, his heirs, successors or assigns, and shall not result in an increase in overriding royalty reserved by the assignor." (Tr. 45)

Petitioner, in its complaint, recites:

> "Plaintiff has duly performed each and all of the obligations required to be performed by plaintiff under said written instrument in the manner and form therein set forth." (Tr. 3)

and that

> "Plaintiff thereafter procured and assigned to defendant, T. F. Murchison, under the provisions of the paragraph at the foot of page 13 of said written instrument,"

other leases on land located in the Premont Field in Jim Wells County, Texas (Tr. 3).

This 1941 contract, now sued on by plaintiff, was executed for plaintiff by Leander J. McCormick, its president, and acknowledged by him in Bexar County, Texas, on September 29, 1941 (Tr. 46-47).

During the latter part of 1940 and throughout the year 1941 Joy Alexander McCartney, a resident of Bexar County, Texas, was employed and engaged by petitioner as its agent in Texas, investigating the geology of land in Galveston County, Texas, and as such agent did negotiate for and acquire leasehold and mineral estates on lands in Galveston County and Jim Wells County, Texas, in his own name and in the name of nominees of said petitioner, all for the use and benefit of the petitioner-corporation (Tr. 166-168).

In *Glo Co.* v. *Joy A. McCartney,* Civil File No. 478, District Court of the United States for the Western District of Texas, San Antonio Division, the petitioner in this action, in its complaint against McCartney, alleged that in October, 1940, McCartney represented to petitioner's organizers and stockholders that he could procure oil and gas leases and mineral estates in Texas if they would furnish him the capital therefor, including that necessary to clear the titles and purchase leasehold estates on certain land in the Alta Loma Subdivision of the Lemuel Crawford Survey in Galveston County, Texas; "that the defendant (McCartney)

agreed to devote his time and efforts to the acquisition of such leasehold and mineral estates as the *agent, trustee and fiduciary for plaintiff and its organizers*" (emphasis added) and that plaintiff advanced various sums of money to McCartney therefor; that McCartney at the time of the suit held title to "leasehold and mineral estates in Sections 71, 72, 76, 77, 78, 80 and 81 of R. P. Haldeman Subdivision of the Seeligson Ranch in Jim Wells County, Texas," which he had purchased with plaintiff's money so advanced, etc. (See Supplemental Transcript of Record and Second Supplemental Transcript of Record.)

In January of 1941, the petitioner-corporation, Glo Co., by and through its president, Leander J. McCormick, did negotiate in Corpus Christi, Nueces County, Texas, with the Tom Graham Oil Company for the drilling of a well on twenty acres of land in Section 76 of the R. P. Haldeman Subdivision of the Seeligson Ranch in Jim Wells County, Texas. The agent of Tom Graham Oil Company was J. A. Kimmey, its employee and landman. All of the *negotiations* for this drilling contract were conducted and consummated in Corpus Christi, Nueces County, Texas (Tr. 169-171). Accordingly, Glo Co. and Tom Graham Oil Company entered into a drilling contract and escrow agreement under date of January 14, 1941, which provided for the drilling of a well on the aforesaid leased Texas land of Glo Co. "at the direction of Owner and at Owner's risk as to the successful completion thereof." Glo Co. deposited $7,500.00 in escrow with this agreement in the Corpus Christi Bank and Trust Company in Corpus Christi, Texas, and the contract provided such sum of money should be paid to the drilling party by the bank "upon being presented with affidavit executed by duly authorized representative of Owner" (Tr. 173-180). On completion of said well, the President of Glo Co., Le-

ander J. McCormick, as such, executed in Nueces County, Texas, an affidavit as to the successful completion of said well. This was sworn to by Glo Co.'s president before Rita Harkin, a Notary Public in and for said Nueces County (Tr. 172-173).

Summary of Argument.

I.

Petitioner's suit was barred from the Texas courts and from the Federal courts sitting in Texas.

The contract sued upon was part of a series of oil and gas business transactions carried on by petitioner in Texas without a permit. The contract, itself, was executed, acknowledged and delivered by petitioner to T. F. Murchison in Bexar County, Texas, and called for further acts of petitioner in Texas which petitioner admits were performed. The Supreme Court of Texas has held that any transaction of business in Texas constitutes doing business within the meaning of the Texas statutes requiring foreign corporations to obtain business permits and that the fact that the transaction was consummated (by execution of an assignment of oil and gas leases) outside of the State of Texas did not exempt the foreign corporation from the requirement to obtain a license. Since petitioner is by Texas statute incapacitated to maintain any suit in the Texas courts on this contract, it is likewise incapacitated to maintain any such suit in the Federal court sitting in Texas.

II.

Petitioner's suit is based on contract and tort and does not affect or involve vested land title.

III.

Trial Court was not required by the Federal Rules of Civil Procedure to make special findings of fact and separate conclusions of law in support of its order dismissing the action.

Rule 41(b) of the Federal Rules of Civil Procedure specifically provides that a dismissal for lack of jurisdiction or improper venue is not an adjudication on the merits and, therefore, findings of fact and conclusions of law were unnecessary under Rule 52(a).

IV.

The Trial Court did not rule on respondents' motions for summary judgment.

V.

The execution of the 1941 contract necessarily included the transaction of business in Texas.

ARGUMENT.

I.

Petitioner's Suit Was Barred from the Texas Courts and from the Federal Courts Sitting in Texas.

As shown in the statement of the case above, the petitioner, a foreign corporation without a permit to do business in Texas and a corporation chartered to purchase and sell, explore and develop oil and gas leases, did, with reference to the properties covered by the contract sued on in this action, engage in what is known as an "oil and gas play" in the customary and accepted manner of oil and gas businesses operating in the State of Texas and elsewhere. The McCartney and Kimmey material shows that, prior to the contract sued on here, there was such course of conduct by plaintiff, to-wit: the geological exploration of Texas land, the acquisition of oil and gas leasehold estates thereon and the drilling and exploration of said leases. And, finally, there comes the 1941 contract here sued on, which constitutes the "farming out" of these leasehold estates in order to secure the further drilling and development thereof, which farmout agreement clearly obligates plaintiff to continue its operations in the State of Texas in connection with the enlargement of the block of leases involved.

And as has also been shown above, the 1941 contract was executed and acknowledged by the president of petitioner in Bexar County, Texas, on September 29, 1941 (Tr. 46-47), and was on that day delivered to T. F. Murchison (Tr. 128), and petitioner also admits (Tr. 3) it was negotiating and attempting to procure new leases in the Premont Field, and was also then negotiating with holders of overriding royalties and oil payments to secure a reduction of the amounts thereof, that it carried on such negotiations

in good faith and with its best efforts and thereafter, as a result thereof, procured and assigned to the respondent, T. F. Murchison, additional leases in the Premont Field, Jim Wells County, Texas (Tr. 44, 45).

In *Normandie Oil Corporation* v. *Oil Trading Company, Inc.*, 163 S. W. (2d) 179, the Supreme Court of Texas, by Justice SHARP, rendered an opinion in 1942 which would appear to be one of the latest decisions on "doing business" in Texas.

The facts in this case were: Oil Trading Company, Inc., was a New York corporation chartered to act as broker or agent in the purchase or sale of oil leases. It was employed by defendant, the Normandie Oil Corporation, to negotiate with and sell to Tide Water Oil Company the defendant's leases in the Conroe Oil Field. The plaintiff did enter into such negotiations and conferences with Tide Water in the City of New York. The Tide Water New York office referred the matter for recommendation to its vice president at Houston, Texas. The president of plaintiff corporation went to Texas and conferred with the Tide Water vice president in his Houston office. Thereafter, plaintiff's president returned to New York and Tide Water's Houston vice president recommended to the New York office that the sale be made. (The sale was consummated by assignments executed in New York.) Plaintiff sued the defendant in the Harris County District Court to recover a commission on the sale of this lease on land in Montgomery County, Texas. Plaintiff did not have a permit to transact business in Texas. The trial court granted judgment for the plaintiff, overruling defendant's request for an instructed verdict and judgment *non obstante veredicto*. The Texas Court of Civil Appeals affirmed this decision and the Supreme Court granted a writ of error. The Supreme Court of Texas held:

First: Burden is on the foreign corporation that brings the suit to show that it had a permit to do business in this state which was granted before the contract was entered into and the business transacted. (p. 181) (Citing cases.)

Second: To the contention that the transaction constituted interstate commerce:

> "The subject-matter of the transaction was the sale of an interest in Texas land. The only 'commerce' involved was the transfer of title to an oil and gas lease, which, under the uniform Texas decisions, constitutes a determinable fee in real property." (pp. 181-182) (Citing cases.)

Third:

> "The mere listing of the property with the plaintiff in New York is not controlling, *nor is the fact that the sale was consummated in New York * * * And where a non-resident corporation performs an act of a local nature, even when that act is part of a contract for the sale of goods in interstate commerce, the act is intrastate, and is subject to regulation by the state. General Ry. Signal Co.* v. *Commonwealth of Virginia, ex rel., State Corp. Comm.*, 246 U. S. 500, 38 S. Ct. Rep. 360, 62 L. ed. 854; *Smythe Co.* v. *Fort Worth Glass & Sand Co.*, 105 Tex. 8, 142 S. W. 1157.
>
> "This court has held that a single transaction will constitute the doing of business within the meaning of Articles 1529 and 1536, requiring foreign corporations to obtain permits before doing business in this state. *Smythe Co.* v. *Fort Worth Glass & Sand Co.*, 105 Tex. 8, 142 S. W. 1157; *Buhler* v. *E. T. Burrowes Co.*, Tex. Civ. App., 171 S. W. 791; *Elliott Electric Co.* v. *Clevenger*, Tex. Civ. App., 300 S. W. 91; *Motor Supply Co.* v. *General Outdoor Advertising Co.*, Tex. Civ. App., 44 S. W. (2d) 507; *Davis* v. *United Shoe Repairing Machine Co.*, Tex. Civ. App., 92 S. W. (2d) 1107; *Fate-*

Root-Health Co. v. *Howard Kenyon Dredging Co.*, Tex. Civ. App., 117 S. W. (2d) 547.

"The construction of Article 1529 was involved in the case of *Smythe Co.* v. *Fort Worth Glass and Sand Co., supra,* and in the opinion in that case this court, in defining what transactions were brought within the purview of such Article, said (105 Tex. 8, 142 S. W. 1161): 'It will be observed that a desire on the part of the foreign corporaton to do either of three things, to transact business, or solicit business, or establish a general or special office in this state, is required to procure a permit. The fact that the act contemplates the transaction of business in this state without the establishment here of a general or special office suggests the idea that it was the evident intent of the Legislature to prevent a single, isolated, or any transaction of business in this state by a foreign corporation when done in pursuance of its general business as authorized by its charter'." (p. 182) (Emphasis added.)

Fourth: Plaintiff is not entitled to maintain its suit in the courts of this State. (p. 182)

Therefore, the Supreme Court of Texas reversed the judgment of the trial court and the Court of Civil Appeals and ordered the dismissal of plaintiff's suit.

For failure to comply with Article 1529, Article 1536, Revised Civil Statutes of Texas, 1925, provides that such foreign corporation cannot maintain any suit or action, legal or equitable, in any court of the State of Texas upon any demand, whether arising out of contract or tort.

Section 1 of Article 2031(a), Revised Civil Statutes of Texas, 1925, prohibits a foreign corporation from transacting any business in the State of Texas without first filing in the office of the Secretary of State a power of attorney designating a resident citizen of Texas as its service agent.

The penalty for violation of Section 1, Article 2031(a) is contained in Section 5, which in part provides that each of any such corporation's acts in this State, as to it, shall be unlawful and void and no such acts, as to it, shall be valid; and that such corporation shall be incapable in Texas of receiving the benefit of exercising in its behalf or enjoying any right, power, privilege or immunity that shall not already have accrued. This article also provides that such corporation shall be incapacitated to maintain any suit or legal proceedings in any court of the State of Texas upon any demand, whether arising out of contract or tort.

Since, in the courts of the State of Texas, the 1941 contract (Tr. 24-47) is unlawful and void as to plaintiff corporation, and plaintiff is incapable of receiving the benefit of exercising in its behalf or enjoying any right, power, privilege or immunity thereunder, and plaintiff corporation is incapacitated to maintain any suit or legal proceedings thereon, the same is true as to plaintiff corporation before the courts of the United States sitting in Texas. *Erie R. Co.* v. *Tompkins,* (U. S. S. C., 1938) 304 U. S. 64, 82 L. ed. 1188, 114 A. L. R. 1487; *Angel* v. *Bullington,* (U. S. S. C., 1947) 330 U. S. 183, 91 L. ed. 832; and *Woods* v. *Interstate Realty Company,* (U. S. S. C., 1949) 337 U. S. 535, 93 L. ed. 1524. It is, therefore, respectfully submitted that the United States Court of Appeals for the Fifth Circuit did properly affirm (as modified) the judgment of the trial court which dismissed this action.

II.

Petitioner's Suit Is Based on Contract and Tort and Does Not Affect or Involve Vested Land Title.

Petitioner's Argument I of its Summary Statement of the Matter Involved is incorrect:

As we have previously stated herein all counts of the complaint are based on the 1941 "farmout" contract. When the complaint was filed in 1951, the leases described in the 1941 contract were no longer valid or subsisting but had expired under their own terms; excepting the two held by gas production, one of which petitioner, *as owner* thereof, itself assigned to the respondents, Sunray Oil Corporation and Murchison and Company, in 1947, and the other is the subject of a separate action by petitioner to which none of the respondents is a party. (See statement of the case above.)

Petitioner's cited cases of authority (petition for certiorari, etc., p. 7) are inapplicable and not in point because they hold only that:

(*a*) "a foreign corporation is not disabled to sue on a contract made within the state, adjusting a judgment debt arising out of business transacted outside the state, * * *"; see: *Security Co.* v. *Panhandle National Bank,* (Sup. Ct. Tex., 1900) 57 S. W. 22, headnote No. 2; or

(*b*) the subject-matter of the suit did not grow out of the business in which the corporation was engaged. See: *Mansur & Tebbetts Implement Co.* v. *Beer,* (Tex. Civ. App., 1898, writ refused) 45 S. W. 972, at 973; and *Elliott Addressing Machine Co.* v. *Campbell,* (Tex. Civ. App., 1942, no writ) 159 S. W. (2d) 967; or

(*c*) the foreign corporation was acting only as a trustee under a will, had manifested no intention to execute the trust in Texas and its suit for possession of the land did not arise out of business or transactions made in Texas. See: *Eskridge* v. *Louisville Trust Co.,* (Tex. Civ. App., 1902, writ refused) 69 S. W. 987; or

(*d*) the purchase (or making) by a foreign corporation, not otherwise doing business in Texas, of a contract made outside the state is not the transaction of business within the state by such foreign corporation so as to forbid it to maintain a suit for breach of contract in the Texas courts; see: *Lakeview Land Co.* v. *San Antonio Traction Co.*, (Sup. Ct. Tex., 1902) 66 S. W. 766; and *Phillip A. Ryan Lbr. Co.* v. *Ball*, (Tex. Civ. App., 1915, no writ) 177 S. W. 226; or

(*e*) the fact a foreign corporation did not have a Texas business permit did not vest in its stockholders the equitable title to land standing in the name of the corporation; see: *Byerly* v. *Camey*, (Tex. Civ. App., 1942; writ refused, want of merit) 161 S. W. (2d) 1105; or

(*f*) the Texas statutes did not "deprive an unregistered foreign corporation of the right to defend an action brought against it * * *"; see: *Elliott Addressing Machine Co.* v. *Campbell, supra*, 159 S. W. (2d) 967 at 969; *Byerly* v. *Camey, supra;* and *Jordan* v. *Granfield*, (Tex. Civ. App., 1926, no writ), 290 S. W. 866, at 869; or

(*g*) the 1887 Texas Permit Statute was void because it made the permit conditional on the surrender by the foreign corporation of a privilege (to remove a suit from the state to the federal court) secured to it by the Constitution and laws of the United States. See: *Texas Land Farm & Mortgage Co. Limited* v. *Worsham, et al.*, (Sup. Ct. Tex., 1890) 13 S. W. 384, at headnote No. 1 and page 385; or

(*h*) there was no allegation or showing that the foreign corporation which was the assignor of defendant had done or desired to do business in Texas, the court further stating that it was "not prepared to hold that it could not have made the assignment in question, so as to authorize

the suit by its assignee." See: *Wilson* v. *Peace,* (Tex. Civ. App., 1905, no writ) 85 S. W. 31, at 32.

III.

Trial Court was not required by the Federal Rules of Civil Procedure to make special findings of fact and separate conclusions of law in support of its order dismissing the action.

Petitioner's Argument II of its Summary Statement of the Matter Involved (petition for certiorari, etc., pp. 8-9) is incorrect:

Defendants' motions to dismiss are motions filed pursuant to Rule 12(b).

Rule 52(a) in part states "findings of fact and conclusions of law are unnecessary on the decisions of motions under Rules 12 or 56, or any other motion except as provided in Rule 41(b)."

Rule 56 applies to summary judgments and is therefore inapplicable here.

Rule 41(b) provides that findings of fact and conclusions of law shall be filed where there is an adjudication on the merits. This rule defines an adjudication on the merits as being a dismissal under any of the subdivisions set forth in said rule "other than a dismissal for lack of jurisdiction or improper venue." Thus, in effect, Rule 41(b) specifically states that a dismissal for lack of jurisdiction or improper venue is not an adjudication on the merits.

Therefore, plaintiff's motions for findings of fact and conclusions of law are without merit and the trial court did not err in overruling same.

The Order of Dismissal states, both on its face and by reference to the defendants' motions to dismiss, that plain-

tiff is a corporation for pecuniary profit, chartered in and by the State of Illinois, and had not, at the time of the transactions set forth in the complaint, obtained a permit to transact business in Texas as required by Article 1529, Revised Civil Statutes of Texas, 1925, that plaintiff at all of said times was engaged in transacting its corporate business in the State of Texas and that, therefore, under Articles 1536 and 2031(a), Revised Civil Statutes of Texas, 1925, plaintiff could not maintain this action; which said order, on its face, contains the findings and conclusions requested by plaintiff. (Tr. 220)

IV.

The Trial Court Did Not Rule on Respondents' Motions for Summary Judgment.

Petitioner's Argument III of its Summary Statement of the Matter Involved (petition for certiorari, etc., p. 9) is not in point because Rule 56(c) of the Federal Rules of Civil Procedure does not apply to respondents' motions to dismiss but instead applies only to motions for summary judgment. The trial court ruled and entered judgment only on the motions to dismiss and did not rule on the motions for summary judgment (Tr. 214, 220-221).

V.

The Execution of the 1941 Contract Necessarily Included the Transaction of Business in Texas.

Petitioner also argues that since the Texas statute, Article 1322 of Chapter 3, "General Provisions" of Title 32, "Corporations—Private," of the Revised Civil Statutes of Texas, 1925, recites that in certain circumstances the deed of a corporation of land shall contain a corporate seal,

that, therefore, *nothing* was done by petitioner with reference to the 1941 contract until the seal was placed thereon by its Secretary—which allegedly was done in Chicago, Illinois, or, perhaps, that all of the acts of petitioner in Texas were a nullity because merged, somehow, in the alleged application of the seal in Illinois.

(The instrument itself shows it was signed and acknowledged by petitioner's president in Bexar County, Texas (Tr. 46-47), in which are located the offices of T. F. Murchison, the other party to that contract. Mr. Murchison himself has sworn that the instrument was both executed and delivered to him on September 29, 1941, which is the date the instrument itself shows petitioner's president signed and acknowledged it in Bexar County, Texas, before a notary public there (Tr. 128).)

We submit that this argument is without merit. The acts of the president of the petitioner, as such, in Texas with reference to this contract cannot be ignored. The Texas statute cited by petitioner states no more than the formal requisites for the execution of a deed by a corporation. Petitioner has sued upon this contract as a contract and, in net effect, is asking no more than specific performance thereof plus damages for the alleged breach thereof (see Argument II hereinabove). There is no question but that the 1941 contract was a valid contract even in the absence of the seal of the Secretary (for example, see 10 Tex. Jur. 947, Corporations, Sec. 297). In addition, petitioner itself admits that the well which was required to be drilled by T. F. Murchison as a part of the consideration for this 1941 contract (Tr. 42) was drilled (Tr. 3) and this is confirmed by Mr. Murchison (Tr. 129). Therefore, if it were petitioner's contention also that the 1941 contract was ineffective as an assignment of the now expired leases, we are of the

opinion that T. F. Murchison could have successfully maintained an action for specific enforcement thereof since petitioner had received the benefit of such written instrument (see 38 Tex. Jur. 725, Specific Performance, Sec. 51).

In addition, the Supreme Court of Texas, in *Normandie Oil Corporation* v. *Oil Trading Company,* cited in Argument I hereinabove, reaffirmed its earlier decisions that the Texas permit statutes (Articles 1529 and 1536) applied to even a single act of transaction of business in Texas by a foreign corporation without a permit; and, in that case, the court found that the sale and assignment of Texas leases was consummated outside of the State of Texas—which is the allegation of petitioner here.

Conclusion.

It is concluded that the decision and judgment of the Court of Appeals was correct and in accordance with the statutes of the State of Texas as construed by the Supreme Court of the State of Texas and, accordingly, that the petition for certiorari must be denied.

Respectfully submitted,

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Attorney for Respondents,
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Sunray Oil Corporation.

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